Lodge No. 10, International Association of Machinists and Aerospace Workers *and* Gary Hammerly and Reynolds Metals Company, Inc., Party to the Contract. Case 5-CB-3099

August 5, 1981

DECISION AND ORDER

Upon an unfair labor practice charge filed on May 14, 1979, by Gary Hammerly (herein also called the Charging Party), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint on July 6, 1979, against Lodge No. 10, International Association of Machinists and Aerospace Workers (herein also called Respondent or the Union), alleging that Respondent engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the complaint and notice of hearing were duly served on Respondent and the Charging Party. Thereafter, Respondent filed a timely answer denying the commission of any unfair labor practices.

On October 17, 1979, the parties filed with the Board a stipulation in the instant proceeding in which they agreed to waive a hearing before an administrative law judge and the issuance of an administrative law judge's decision, and to submit the matter directly to the Board for findings of fact, conclusions of law, and an appropriate order. They stipulated that the charge, the complaint and notice of hearing, Respondent's answer, and the formal stipulation and exhibits attached thereto constitute the entire record herein. On January 15, 1980, the Board issued an order approving the stipulation, transferring the proceeding to the Board, and permitting the filing of briefs. Thereafter, the General Counsel and Respondent filed briefs.

Upon the entire record in the case, the Board makes the following findings:

I. JURISDICTION

Reynolds Metals Company, Inc. (herein also called the Company or the Employer), is a Delaware corporation engaged in the operation of various manufacturing facilities throughout the United States where it produces aluminum and allied products. Only its facility at Seventh and Bainbridge Streets, Richmond, Virginia, also called the South Plant, is involved herein.

During the preceding 12 months, a representative period, the Company purchased and received in interstate commerce materials and supplies valued in excess of $50,000 from points located outside the Commonwealth of Virginia.

At all times material herein, the Company is, and has been, an "employer" as defined in Section 2(2) of the Act, engaged in "commerce" and in operations "affecting commerce" as defined in Section 2(6) and (7) of the Act, respectively.

II. THE LABOR ORGANIZATION INVOLVED

Lodge No. 10, International Association of Machinists and Aerospace Workers, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The issue presented is whether Respondent, by denying certain unit employees, specifically storeroom attendants, an opportunity to vote on which schedule they would work, violated Section 8(b)(1)(A) of the Act.

A. *The Facts*

The Employer operates various manufacturing facilities, including the South Plant involved herein. Respondent represents, in a single unit, various employees at the South Plant, including machinists, roll grinders, and storeroom attendants. The Employer and Respondent were parties to a collective-bargaining agreement effective June 1, 1977, to June 1, 1980, which provided, *inter alia*, that the Employer may schedule all or part of its employees to a 7-day, four-shift continuous operation. During negotiations for this agreement, the Employer and Respondent orally agreed that, if it became necessary for unit employees to work a 7-day, four-shift schedule, Respondent could decide which of four different 7-day schedules the unit employees would work.

In late 1977 the Employer advised Respondent that in January 1978 the machinists[1] would have to commence working a 7-day schedule.[2] On December 18, 1977, Respondent held a meeting for all of its members in the South Plant unit to vote on which schedule the machinists would work. At this meeting, during which nonmembers were not permitted to participate, the members, regardless of classification, voted that the machinists would work under Schedule 1.[3] Of the two storeroom at-

[1] At all times material hereto, there were approximately 70 machinists, of whom approximately 60 were members of Respondent.

[2] The South Plant roll grinders signed a memorandum dated December 15, 1977, wherein they agreed to "cover the forthcoming seven-day operation" by working overtime on weekends.

[3] More specifically, the members decided that the 16 machinists who were to work on a 7-day schedule would work under Schedule 1 for a period of 38 weeks or until the number of machinists required to work a 7-day operation exceeded 24, and thereafter the machinists would revert to Schedule 3 if a 7-day operation were still needed.

tendants then employed by the Employer, both were members of Respondent, but only one participated in the vote. There was no mention at this meeting about the storeroom attendants converting to a 7-day schedule. Sometime after this meeting, the machinists commenced working under Schedule 1.

On October 29, 1978, Respondent conducted another meeting for all of its members who were in the South Plant unit. The membership voted that the machinists would remain on Schedule 1 until the number of machinists required to work a 7-day schedule exceeded 24, at which time they would revert to Schedule 3. At this meeting, during which nonmembers of Respondent were not permitted to participate, there was again no mention of the storeroom attendants converting to a 7-day schedule. The two storeroom attendants then employed by the Employer were both members of Respondent, but only one participated in the vote. In February 1979 the number of machinists on a 7-day schedule exceeded 24, and, accordingly, the machinists converted to Schedule 3.

Also in February 1979 the roll grinders commenced working under Schedule 1 after the Employer conducted a poll among all the roll grinders as to which schedule they desired. Shortly before, or simultaneously with, the poll, the roll grinders received from Shop Steward Robert Herring copies of the four proposed 7-day schedules. Although Respondent was not notified that the poll was to be conducted, Respondent, having knowledge of the outcome of the vote, at no time objected in any manner to the poll or to the roll grinders working under Schedule 1. Of the 14 roll grinders, 13 were members of Respondent.

In April 1979 John Hesse, the Employer's storeroom attendant foreman,[4] informed all five of the Employer's storeroom attendants that they would be given the opportunity to vote on which 7-day schedule they would work. About the same time Respondent was notified that the storeroom attendants would have to work a 7-day schedule. Shop Steward Herring, on or about May 1, 1979, advised the Employer that the storeroom attendants would work the same 7-day schedule that the machinists were working; i.e., Schedule 3. At this time four of the storeroom attendants, Gary Sims, Larry Johnson, Robert Huband, and Gary Hammerly, the Charging Party, were not members of Respondent, and John Hensley, the second most senior storeroom attendant, was a member of Respondent. When the storeroom attendants learned from Herring that they would be working under Schedule 3, Sims, Johnson, Huband, and Hammerly approached Ralph Totty, a maintenance supervisor, about their not having voted on which schedule they would work. Totty, after investigating the situation, told the four that he had met with Respondent's shop committee and that there was nothing he could do. Thereafter, Huband and Hammerly approached Herring and told him that they wanted him to have a meeting among the storeroom attendants so that they could vote on which schedule they would work. Herring refused to do so. Effective May 7, 1979, the storeroom attendants commenced working under Schedule 3. They were never given an opportunity to express which of the four 7-day schedules they preferred, except to the extent that at the December 18, 1977, and October 29, 1978, meetings all members of Respondent were able to express a preference as to which 7-day schedule the machinists would work. There was no necessity for the storeroom attendants to work under Schedule 3.[5]

B. *Contentions of the Parties*

The General Counsel contends that Respondent breached its duty to fairly represent the storeroom attendants when it arbitrarily, or for reasons of nonmembership in the Union, failed to allow them to vote on which of four schedules they preferred to work when it became necessary for them to work a 7-day operation. Respondent contends that, *inter alia*, pursuant to the collective-bargaining agreement, the matter at issue was exclusively within the Union's control because the votes of December 18, 1977, and October 29, 1978, were open to all members of Respondent (including the two storeroom attendants then in the Employer's employ) and determined what schedule would be applied to *all* employees required to work a 7-day operation; the Union properly applied Schedule 3 to the storeroom attendants; and, since the complaint does not allege that Respondent violated Section 8(b)(1)(A) of the Act by limiting these votes to union members, *Branch 6000, National Association of Letter Carriers (United States Postal Service, West Islip, N.Y.)*,[6] is not controlling herein. For these reasons, Respondent contends that the complaint should be dismissed in its entirety.

C. *Discussion of Law and Conclusions*

The schedule which employees are to work is unquestionably a term and condition of employment which directly concerns every employee in a bargaining unit irrespective of union membership.[7]

[4] A supervisor within the meaning of Sec. 2(11) of the Act.

[5] Schedule 3 was the only one of the four 7-day schedules which enabled union member Hensley to work on the day shift, Monday through Friday, every week.

[6] 232 NLRB 263 (1977).

[7] *Ibid.*

Here, Respondent, pursuant to the collective-bargaining agreement, admittedly possessed the authority to select which of four schedules the South Plant unit employees would work if they were required to work a 7-day operation. Nonetheless, Respondent had a concurrent statutory obligation to exercise this authority upon considerations or classifications which are not arbitrary, discriminatory, or in bad faith.[8] If Respondent failed to satisfy this obligation when, in its statutory representative capacity, it denied the storeroom attendants a vote in the selection of their work schedule, then it violated Section 8(b)(1)(A) of the Act. For the reasons set forth below we find that the process set by Respondent for the selection of a work schedule for the storeroom attendants was discriminatorily based on considerations of nonmembership in the Union and that it arbitrarily denied one classification of employees an opportunity to participate.

The record establishes a pattern by Respondent of basing the selection of which schedule the South Plant unit employees would work on votes limited in participation to member unit employees. The elections conducted by Respondent in both December 1977 and October 1978 to determine which of four schedules the machinists would work, while open to all unit job classifications, were closed to nonmember unit employees.[9] Selection of a work schedule for the roll grinders followed the same basic pattern in that all the roll grinders, 13 out of 14 of whom were union members, were polled as to which schedule they preferred. While this poll was conducted by the Employer, the result thereof was implemented without Respondent's objection. In contrast, Respondent made no effort to ascertain which schedule the five storeroom attendants preferred to work. To the contrary, Respondent, despite the repeated requests of the four nonmember storeroom attendants, denied them a vote on the matter and directed the Employer to implement a schedule which allowed the sole member storeroom attendant to continually work the day shift and have every weekend off. On these facts, we find that the General Counsel has established a *prima facie* case that Respondent refused to permit the storeroom attendants to vote on which of the four schedules they would work because of their nonmembership in the Union.

Respondent attempts to justify its procedure for schedule selection *vis-a-vis* the storeroom attendants on the grounds that the votes of December 1977 and October 1978 were were open to all members of Respondent, including the two storeroom attendants then employed by Respondent; that these elections determined what schedule *all* unit employees were required to work; and that Respondent was therefore obligated to apply the schedule selected at those meetings to the storeroom attendants. The record, however, does not support Respondent's position.

To the contrary, while member storeroom attendants were eligible to participate in the December 1977 and October 1978 votes, and at each of these meetings one of the two then employed by the Employer did participate in the vote, the issue under consideration was the selection of a 7-day schedule for the machinists alone,[10] and not for all of the employees of the South Plant unit as Respondent now claims. In fact, the possibility of the storeroom attendants converting to a 7-day schedule was not mentioned at either meeting. Further, Respondent did not require the roll grinders to be bound by the votes of those meetings, but instead allowed them to select, through an Employer-conducted poll, which schedule they would work.

Thus, other than Respondent's contention that the votes taken in the above membership meetings determined the scheduling for all unit employees—a contention which, for reasons already noted, is unsupported by the evidence—Respondent has not offered any explanation for its imposing a particular schedule on the storeroom attendants while allowing the machinists and the roll grinders to decide for themselves which schedule they would work. Nor has Respondent otherwise explained

[8] *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

[9] It is axiomatic that Respondent, as the representative of all the bargaining unit employees, lawfully could not restrict voting on this term and condition of employment to its members only. Thus, Respondent was required to give all unit employees, regardless of whether they were or were not members, a chance to exercise a vote, since the subject matter related to the terms of their employment. Apparently, the complaint does not allege, and the General Counsel does not assert, that Respondent violated Sec. 8(b)(1)(A) by limiting to members only the December 1977 and October 1978 votes because both votes occurred more than 6 months prior to the filing of the charge on May 14, 1979. Those votes, however, establish critical elements of proof of the alleged 8(b)(1)(A) violation concerning the manner in which the shift schedule to be worked by the storeroom attendants was selected, and, consistent with well-established policy, we shall rely upon them for the sole purpose of background to explain otherwise ambiguous conduct occurring within the statutory limitation period. *Local Lodge No. 1424, International Association of Machinists, AFL-CIO [Bryan Manufacturing Company]* v. *N.L.R.B.*, 362 U.S. 411 (1960); *Painters Local Union No. 1627 (William R. Johnson d/b/a Johnson's Plastering Co.)*, 233 NLRB 820 at fn. 4 (1977).

[10] Respondent claims that the stipulation contains an admission that the reason it applied Schedule 3 to the storeroom attendants was because that schedule was selected by the membership at the December 1977 and October 1978 meetings, citing par. 20 of the stipulation which, in pertinent part, states:

> They [the storeroom attendants] were never given an opportunity to express any preference as to which of the four seven-day schedules they preferred, except to the extent that all members of Respondent, at the December 18, 1977, and October 29, 1978, meetings of Respondent, were able to express a preference as to which seven-day schedule the machinists would work.

If an admission, this sentence acknowledges that the only preference the storeroom attendants were permitted to express related to which schedule they preferred the machinists to work.

why it denied the nonmember storeroom attendants' request to vote; insisted on the application of Schedule 3 even though it was not necessary that they work that schedule; and selected a schedule which most favored the sole member storeroom attendant. We therefore conclude that Respondent has failed to overcome the General Counsel's *prima facie* showing that the schedule selection process was based on considerations of union membership. Accordingly, we find that Respondent, by denying the predominantly nonmember storeroom attendants a vote to determine which of the four 7-day schedules they would work for reasons connected to membership in Respondent, violated Section 8(b)(1)(A) of the Act.[11] We also find that Respondent's exclusion of one classification of unit employees from the voting opportunity granted to employees in two other classifications was arbitrary and thereby a breach of Respondent's duty of fair representation in violation of Section 8(b)(1)(A) of the Act.[12]

IV. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. By not according storeroom attendants an opportunity to vote on which of four schedules they would work when it became necessary for them to work a 7-day operation for reasons related to membership in the Union and based on arbitrary considerations, Respondent violated Section 8(b)(1)(A) of the Act.
4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Lodge No. 10, International Association of Machinists and Aerospace Workers, Richmond, Virginia, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Failing to represent storeroom attendants, or any unit employees, for reasons connected to union membership or for arbitrary considerations.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purpose of the Act:

(a) Give the storeroom attendants the opportunity to select which of the four shift schedules previously submitted to Respondent by the Employer they would prefer to work.

(b) Inform the Reynolds Metals Company, Inc., of the results of the vote and request it to implement the schedule selected.

(c) Post at its business offices, meeting halls, and all other places where notices to members are customarily posted copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notice are not altered, defaced, or covered by any other material.

(d) Furnish the Regional Director for Region 5 signed copies of said notice for posting by the Employer, if the Employer is willing, in places where notices to its employees are customarily posted. Copies of said notice, after being signed by a duly authorized representative of Respondent, shall be forthwith returned to said Regional Director for transmission by him to the Employer.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[11] *United States Postal Service, West Islip, N.Y., supra.*

[12] *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 671 (Airborne Freight Corporation of Delaware)*, 199 NLRB 994 (1972); *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962).

Chairman Fanning does not join in his colleagues' reliance on *Miranda, supra*, but he agrees that Respondent's discrimination was illegal and arbitrary.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT fail to represent storeroom attendants, or any other unit employees, for reasons connected to union membership or for arbitrary considerations.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL give the storeroom attendants the opportunity to select which of the four shift schedules previously submitted to us by the Employer they would prefer to work.

WE WILL inform Reynolds Metals Company, Inc., of the result of the vote and request it to implement the schedule selected.

LODGE NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS